IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr. Appeal No. 125 of 2006.

Reserved on: 8.3.2007.

Date of decision: 14.3.2007.

Dinesh Rai ... Appellant

Versus

State of H.P. … Respondent

Coram :

The Hon'ble Mr. Justice V.K. Ahuja, Judge.

Whether approved for reporting?[1] No.

For the appellant: Mr. Rahul Mahajan, Advocate.

For the respondent: Mr. Ashutosh Burathoki, Additional Advocate General.

V.K. Ahuja, J. :

This appeal has been filed by the appellant against the conviction and sentence imposed by the learned Presiding Officer, Fast Track Court, Mandi, vide his judgment dated 5.4.2006. The appellant was sentenced under Section 20 of Narcotic Drugs & Psychotropic Substances Act (hereinafter referred to NDPS Act), to undergo rigorous imprisonment for a period of five years and to pay a fine of Rs.50,000/- and in default of payment of fine, the appellant was directed to further undergo simple imprisonment for one year.

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[1]Whether reporters of Local Papers may be allowed to see the judgment? Yes.

Briefly stated the facts of the case are that on 23.10.2004 PW10 H.C. Ram Lal along with PW2 C. Sant Ram, C. Vidya Sagar and C. Yoginder Pal was present at Pandoh Dam National Highway-21 for traffic checking at about 4.00 P.M. A bus bearing registration No. HP-65-7503 came there from Kullu side which was stopped by them. The documents of the bus were checked and found to be correct. Thereafter, PW10 H.C. Ram Lal along with constables entered the bus for checking and associated driver of the bus and PW1 Nirmal Kumar, conductor of the bus. The appellant (hereinafter to be referred also as accused) was found sitting at seat No. 37 along with a bag. On seeing the police party, he became perplexed and the bag was checked which was containing shirt, two pants, underwear etc. and on checking in one T. shirt red in colour a packet containing charas in the shape of sticks was recovered. On weighment, the same was found to be weighing 750 grams. Two samples each weighing 25 grams were taken from the packet and was sealed separately, while the remaining packet of charas was sealed after putting the same in the same T. shirt. These were taken into possession, as per procedure, N.C.B. form was filled at the spot. The spot map was prepared. A ruka was sent to the Police Station. The accused was informed about the grounds of arrest. The case property was produced before the S.H.O., Police Station Sadar Mandi along with N.C.B. form and sample seal who resealed the same. On 24.10.2004 special report was sent to S.P. Mandi through C. Sant Ram.

On completion of the investigation, the challan was presented before the learned Sessions Judge who assigned the case to trial Court who tried the appellant after framing of charge under Section 20 of NDPS Act. The plea taken by the appellant was that of denial only and that nothing was recovered from him. On conclusion of the trial, the accused was held guilty and convicted and sentenced as detailed above.

I have heard Mr. Rahul Mahajan, Advocate, appointed by the Court for the appellant and Mr. Ashutosh Burathoki, learned Additional Advocate General, for the respondent/State.

The points raised by the learned counsel for the appellant were that there was no occasion for the Investigating Officer to take the weight and scale with him which showed that he had the prior knowledge that the charas can be recovered from the bus. The next point raised was that though the bag as per law was not required to be searched in view of Section 50 of the Act, but still when the appellant had become perplexed, it was required that the procedure as prescribed under Section 50 of the Act should have been followed. It was also submitted that the passengers should have been associated as witnesses. It was also submitted that there are contradictions in regard to the fact as to whether the charas was in the shape of sticks or chapatti and this is a major contradiction which makes the prosecution story doubtful. Thus, it was submitted that the manner in which the recovery was effected makes the prosecution story doubtful and, therefore, the

findings of the learned trial Court holding the appellant guilty are liable to be set aside.

On the other hand, the learned Additional Advocate General supported the impugned judgment for reasons given supplementing it by submission that the witnesses associated were independent witnesses being employees of a private company and not of Government Department and there was no occasion of associating the passengers when the driver and conductor of the bus had been associated and the passengers are quite reluctant to be associated as witnesses. It was also submitted that the provisions of Section 50 of the Act were not applicable since it was not a case of personal search but of bag and there are no material contradictions in the statements of the witnesses. Thus, the findings of the learned trial Court holding the appellant guilty are liable to be affirmed.

On a perusal of the evidence led by the prosecution it is apparent that there is statement of PW10 H.C. Ram Lal who was present along with three constables named by him and checking of the bus was done which came there. Thereafter, he associated the driver and conductor of the bus and checked the bus. The accused was found sitting at seat No. 37 having a bag with him and since he became perplexed, on suspicion search of the bag was conducted. He stated that the recovery of charas was made in the shape of sticks from the T. shirt in the bag. The charas on weighment was found to be 750 grams and two samples each weighing 25 grams were taken out of the same and these were sealed at the spot. He proved the seizure memo Ext. PW1/B

signed by two witnesses i.e. the driver and conductor. He stated that he filled the N.C.B. form, prepared the spot map, sent ruka to the Police Station and informed the accused about the grounds of arrest. He produced the case property before the S.H.O. Police Station along with N.C.B. form who resealed the same. His statement has been materially corroborated by PW1 Nirmal Kumar, conductor of the bus and PW2 H.C. Ram who was accompanying PW10 H.C. Ram Lal at that time.

PW3 ASI Lal Chand was the MHC who recorded the F.I.R. on receipt of ruka. PW4 S.I. Nand Lal, Reader to S.P. Mandi has proved about the receipt of the special report and he put up the same before the S.P. who appended his signatures on the said report after seeing it. PW5 H.C. Dharam Chand had taken the samples to the office of expert at Kandaghat which was given to him by the MHC. The said MHC had been examined as PW6, namely, Baldev Singh, who had sent the samples for examination. PW7 H.C. Shayam Lal had formally recorded the statement of some witnesses. PW8H.C. Lal Singh has proved the rapat in regard to departure of the police officials for patrolling and checking along with H.C. Ram Lal and three constables named therein. PW9 Naresh Kumar Sharma, S.H.O. had resealed the case property and had filled the N.C.B. form also and prepared the final report in this case.

Coming to the first point in regard to the weight and scale raised by the learned counsel for the appellant, PW10 has stated that charas was weighed with the weight and scale meaning thereby that it was available with the Investigating Officer

at that time. It has rightly been submitted by the learned Additional Advocate General that keeping in view the number of cases of recovery of charas etc. in the District of Kullu, it is quite natural for the Investigating Officer to take the weight and scale with them at the time of raid/checking or traffic checking and there is nothing unusual in their carrying weight and scale with them. There is substance in the plea raised by the learned Additional Advocate General. Keeping in view the number of cases which are reported from District Kullu and the statement of the Investigating Officer, it cannot be doubted merely because he was carrying these weight and scale with him in his bag, he had prior knowledge. The plea raised by the learned counsel for the appellant is repelled being devoid of any force.

Coming to the plea that since the accused had become perplexed on seeing the police party, it was necessary for the Investigating Officer to have resorted to the provisions of Section 50 of the Act by giving an offer to the accused in case he desires he can be taken to the nearest Magistrate or nearest Gazetted Officer. Section 50 of the Act deals that if a person so requires he can be taken without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate. The question as to whether these provisions of the Act are applicable in case of personal search or they apply to the bag also being carried by such person, this question had been discussed at length by the Hon'ble Apex Court as well as various High Courts. The learned trial Court has rightly relied upon the decision of the Hon'ble Apex

Court in this regard reported in **State of H.P.** Vs. **Pawan Kumar**, **2005 (Cri. L.J. 2208)**, wherein it was held that the said section would not apply to the search of the vehicle, container, bag or premises etc. There is no necessity to refer to any other decision. The search was conducted of the bag in possession of the appellant and the provisions of Section 50 of the Act were not attracted to the present facts and non-compliance of the same would not render the search conducted to be illegal. In regard to the pleas that the appellant had become perplexed, these provisions should have been resorted to, I am unable to agree to this submission. The above decision is very clear that it does not apply to the search of the bag found on the person of the accused and it is quite natural that in case some person sees the police party, he will become perplexed or will be under a fear, if he is possessing some contraband, there is nothing unnatural. The provisions of Section 50 of the Act are not required to be resorted to in such a situation.

Coming to the point raised by the learned counsel for the appellant that the passengers should have been associated, it is a common knowledge that the passengers of the bus are reluctant to help the police party at the time of such search, to avoid inconvenience that they will have to face for appearing in the Court. The requirement of law in regard to independent witnesses was complied with when driver and conductor of the bus were associated. They were working in a private bus company and they were not government employees or under the thumb of the police and one of them Nirmal Kumar was examined and

non-association of the passengers at the time of recovery does not make the prosecution story doubtful. There is no contradiction in regard to the search, which was conducted in the bus and then the appellant was made to get down from the bus and other formalities were completed . Coming to the recovery of charas whether it was in the form of chapati or sticks and the contradictions, if any, in this regard PW10 and Incharge of the raiding party, had stated that the charas was recovered which was in the shape of sticks. PW1 Nirmal Kumar, conductor of the bus has not stated anything as to the shape of charas and no questions were put up to him. PW2 H.C. Sant Ram was also not put up any question in this regard nor he stated anything. The recovery memo Ext.PW1/D does not make a reference to the charas whether it was in the shape of a chapatti or sticks. Ext. PW1/E the notice given to the accused also does not specify the shape of the charas, though in Ext. PW2/A memo and memo of personal search Ext. PW1/B, there is a reference to the recovery of charas in the shape of chapatti. This fact cannot be lost sight of that statement of PW10 Ram Lal was recorded on 24.1.2006 though the occurrence was of 23.10.2004 i.e. his statement was recorded after more than a year and this minor contradiction, if any, in the description of the case property does not make the statement of the witness doubtful in any manner or that the prosecution story cannot be believed.

Reliance was placed upon the decision in **Balwinder Singh** Vs. **Asstt. Commr. Customs and Central Excise**, **(2005) 4 Supreme Court Cases 146,** where the question involved was the propriety of the conviction of the

registered owner of the vehicle from where the drugs were recovered. The decision in **Sunil Kumar** Vs. **State of H.P.**, **2004(2) Shim. L.C. 135,** shows that the recovery was of charas concealed in a polythene envelope found tied under belly. The question of the non-compliance of the provisions of Section 50 of the Act was also raised. Both the decisions are based upon the facts of those cases and are not applicable to the present facts.

The statements of the Investigating Officer and the police constables cannot be disbelieved merely because of their official status and there are decisions of Hon'ble Apex Court that the statement of an official witness cannot be discarded merely because of his official status.

From the above discussion, it is clear that there are no material contradictions in the statements of prosecution witnesses or any infirmities.

On consideration of the evidence of the prosecution, I am of the opinion that the findings of the learned trial Court holding appellant guilty under Section 20 of the N.D.P.S. Act calls for no interference by this Court and as such, they are liable to be affirmed.

On the point of sentence the learned counsel for the appellant has submitted that the appellant deserves leniency of the Court being a young man. On the other hand, the learned Additional Advocate General has submitted that the sentence has already been reduced under Section 20 of the Act keeping in view the quantity and the learned trial Court had, therefore, awarded

adequate sentence which has to be deterrent and it therefore, calls for no interference.

The provisions of Section 20 of the Act were amended and the sentence was reduced keeping in view the quantity recovered. According to Section 20 of the Act, in case the recovery is of quantity lesser than commercial quantity but greater than small quantity, the sentence of rigorous imprisonment for a term may extend to ten years, and with fine which may extend to one lakh rupees. Keeping in view the recovery of 750 grams which was more than the small quantity but less than commercial quantity, I am of the opinion that the sentence imposed by the learned trial Court which has to be deterrent, calls for no interference keeping in view the number of cases which are being reported under this Act. There is no merit in this appeal and the same is dismissed accordingly. A copy of the judgment be sent to the accused/appellant through the Jail Superintendent and it be given to him against a proper receipt for filing of appeal/information. A copy of the judgment along with record be also sent to the concerned Court.

(V.K. Ahuja),
Judge

March 14, 2007
(BSS)